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December 2, 2005

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Re: Docket No. 03-0372, Instituting a Proceeding to Investigate Competitive Bidding for New Generating Capacity in Hawaii

Dear Parties and Participant:

In accordance with Ordering Paragraph No. 3 of Order No. 22153, filed on December 1, 2005, enclosed is the Outline of Topics for the Panel Hearing scheduled to commence on December 12, 2005.

In response to the letters from Hawaiian Electric Company, Inc. ("HECO"), the Division of Consumer Advocacy ("Consumer Advocate"), and the Kauai Island Utility Cooperative, dated December 1, 2005, the Commission made several changes to the Outline of Topics circulated at the pre-hearing conference of November 29, 2005. In addition to a revised Outline of Topics, the Commission is circulating today a list of Panel Subtopics, which reflects the suggestions of HECO and the Consumer Advocate.

1. To Panel A, "How Should Competitive Bidding be Integrated With IRP?", the Commission included as subtopics Renewable Issues, Parallel Planning and Exceptions to Competitive Bidding.
2. Old Panel K ("Should the PPA Selection Process Account for Debt Equivalency of Long-Term Contracts?") was re-lettered as Panel J.

3. The Commission added new Panel K, "Other Considerations in Cost Comparisons," to capture the many cost dimensions, other than transmission cost (old Panel J) and debt equivalency (old Panel K), that are relevant to the selection process.
4. The Commission moved old Panel J ("Proper Treatment of Transmission Upgrade Costs When (1) Evaluating Bid Options and (2) Negotiating Contracts") into a subtopic of new Panel K.
5. The Commission renamed Panel L ("Application of Competitive Bidding Rules to KIUC") as "Application to KIUC".
6. Concerning the Consumer Advocate's recommendation that the proceeding address the Commission's role: The Commission expects this issue to arise as a distinct point within most of the panels. Most of the panels address issues that call for some type of Commission involvement, whether establishing rules in advance or deciding issues during the process. The panel participants therefore should be prepared to discuss the Commission's recommended role within the subject context of each panel. Then, in Panel N ("Post-Hearing Procedural Options") the participants will address what actions the Commission should take once the proceeding closes.

The Commission will distribute to the Parties and Participant a final agenda for the Panel Hearings no later than December 9, 2005. The panels and their sequence will not change between now and the date of issuance of the final agenda. It is possible, however, that the subtopic detail for each panel will be revised in the next week as the Commission continues its preparation for the Panel Hearings.

Sincerely,



Michael Azama
Commission Counsel

MA:cs

Enclosure

**Public Utilities Commission
State of Hawaii
Competitive Bidding Investigation
Docket No. 03-0372
Outline of Panel Topics for Discussion¹
December 2, 2005**

1) Establishing the Type and Timing of New Generation

Panel A

How Should Competitive Bidding be Integrated With IRP?

- i) Options for relationship between IRP and competitive bidding
- ii) Renewable issues
 - (1) Renewable set-aside
 - (2) Separate procurement for as-available renewable energy
- iii) Parallel planning
- iv) Exceptions to competitive bidding

Panel B

Design of Request For Proposals

- i) Choosing a solicitation method
 - (1) RFP format
 - (2) Standard offer procurement system
 - (3) Auctions
- ii) Who is eligible to respond to the RFP?
 - (1) Affiliates and self-build option
 - (2) Size Issues
 - (3) Demand side v. supply side
 - (4) Sole source v. all source bids
- iii) Process for developing RFP

¹ Subject to change.

- (1) Commission review approach
 - (2) Utility control over RFP development
 - (3) Collaborative approach
 - (4) Independent entity ("IE") role
- iv) Content of RFP
 - (1) Information supplied to bidder
 - (2) Utility cost benchmark
 - (3) Threshold requirements
- v) Selection Process
 - (1) Closed vs. open bidding
 - (2) Selection procedures and criteria

Panel C
Design of Purchased Power Agreement

- i) Overview of purpose of the PPA
 - (1) The PPA and risk allocation
 - (2) Benefits of PPA in competitive bidding process
- ii) Overview of types of PPAs and generation products
 - (1) Tolling agreements
 - (2) Standard offer contract and requirements contracts
 - (3) Turnkey agreement
 - (4) QF Contracts
- iii) Commission options
 - (1) Pros and cons for Commission involvement in PPA terms
 - (a) Contract options
 - (b) Policy reasons for standardization
 - (2) Provision-specific analysis of PPA terms
 - (a) Definitions
 - (b) Pricing and payment calculation, quantity and duration
 - (c) Condition Precedent

- (d) Milestones
- (e) Reliability
- (f) Default and remedies
- (g) Force Majeure
- (h) Credit, security and insurance
- (i) Construction approval and dispatch rights
- (j) Fuel: Tolling vs. traditional PPAs
- (k) Regulatory out
- (l) Dispute resolution
- (m) Interconnection
- (n) Miscellaneous options regarding facility sale, postcontract issues dates and inservice dates
- (o) Summary of PPA provisions and consequences for cost recovery
- (p) Unique issues for renewables

(3) Is the PPA 100% binding or can it be renegotiated?

Panel D

What Time Frame Should Apply to the Competitive Bid Process?

- i) Milestones
- ii) Time expenditures necessary for each milestone
- iii) Fast track options
- iv) Interim procedures
- v) Exceptions from competitive bidding. (This item refers to exceptions for particular resources; not for particular companies.)

2) Assuring Even-Handed Competition Between Utility and Independent Generators

Panel E

Utility Participation as Competitor, and Exclusive Utility Responsibilities

- i) Roles which must stay with the utility
 - (1) legal obligations
 - (2) engineering requirements
- ii) Alternative methods of utility participation
- iii) Scenarios in which utility participation raises no competitive concerns
- iv) Scenarios in which utility participation does raise competitive concerns
- v) Evaluation of methods for addressing competitive concerns

Panel F

Market Structure and Process in Which No Competitor Has an Unearned Advantage

- i) Examples of unearned advantages
- ii) Possible competitive effects of unearned advantages
- iii) Methods for determining seriousness of adverse competitive effects
- iv) Methods for removing adverse competitive effects

Panel G

Utility Cost Recovery of Wholesale Purchase Costs and Utility Self-Build Costs

- i) Cost recovery methods
- ii) Competitive effects of different cost recovery treatments
- iii) Financial effects of different cost recovery treatments

Panel H: PURPA Purchase Obligations v. Competitive Bidding

- i) The utility's PURPA obligation before EPACT 2005
- ii) Effect of EPACT 2005 amendments to PURPA
 - (1) EPACT 2005: eliminates the utility's PURPA obligation if there are competitive wholesale markets
 - (2) Applicability to Hawaii
- iii) Options for competitive bidding consistent with the utility's PURPA obligations
 - (1) Require the QFs to participate in the same competitive bid as nonQFs without granting QFs any special privileges
 - (2) Require the QFs to participate in the same competitive bid as nonQFs but grant QFs a special option to force the utility to buy from the QF
 - (3) Have two separate competitions: one for QFs and one for nonQFs
 - (4) Other options

Panel I

Dispute Resolution during the Competitive Bidding Process

- i) Options
 - (1) IE resolves disputes
 - (2) Commission resolves disputes through existing processes
 - (3) Commission resolves disputes through a new process
- ii) Evaluation
 - (1) IE resolves disputes
 - (2) Commission resolves disputes through existing processes
 - (3) Commission resolves disputes through a new process

3) Assuring Proper Cost Comparisons of Competing Bids

Panel J

Should the PPA Selection Process Account for Debt Equivalency of Long-Term Contracts?

- i) Technical explanation of debt equivalency
- ii) Trends in financial community treatment
- iii) Present treatment of HECO
- iv) Methods for accounting for debt equivalency in bid evaluation

Panel K

Other Considerations in Cost Comparisons

- i) Proper treatment of transmission upgrade costs when (1) evaluating bid options and (2) negotiating contracts
 - (1) Determining when transmission upgrades benefits all users
 - (2) Treatment of transmission upgrade costs
 - (a) Evaluation based only on cost, disregarding benefits
 - (b) Evaluation based on cost and benefits
 - (3) Effect on PPA negotiations
- ii) Effects of total amounts of firm and as-available purchase power on utility's system
- iii) Integration into Planning and Operations
- iv) Dispatchability
- v) Flexibility of maintenance schedules
- vi) Plant design
- vii) Operator experience
- viii) Ability and willingness of seller to accept financial risk
- ix) Other considerations

4) Miscellaneous Issues

Panel L Application to KIUC

- i) Options
 - (1) Exempt KIUC entirely from competitive bidding
 - (2) Partially exempt KIUC from the process
 - (3) Grant case by case exemptions to KIUC
 - (4) Grant no exemption to KIUC
- ii) Evaluation

Panel M Legal Questions

- i) IRP and Competitive Bidding
 - (1) Does the IRP statute or rules restrict the Commission in determining how the resources identified by the IRP process may be defined or procured in a competitive bidding process?
 - (2) For example, to what extent may the utility or Commission, in conducting the RFP process, modify the resources identified in the IRP process?
- ii) Design of RFP
 - (1) If the RFP rules required RFP respondents to make their bids irrevocable, what would be the effect under contract law? Is there any legal difficulty posed by this approach?
 - (2) What kinds of requirements, if any, does PURPA impose on design of an RFP? That is, can the type of projects to be described in an RFP be chosen independently of any offers from PURPA qualifying facilities?
- iii) Design of PPA
 - (1) Does Hawaii law permit liquidated damages for delay or nonperformance in a PPA?
 - (2) Are "regulatory out" clauses permissible under Hawaii law?

- (3) Are there any types of Commission-required contractual provisions that are barred by PURPA?

iv) Utility as Competitor

- (1) Does the utility have a legal obligation to have sufficient capacity at all times?
- (2) Assuming there is such a legal obligation:
- (3) Does this legal obligation preclude the Commission from prohibiting the utility from participating as a prospective seller in a competitive bid?
- (4) Does this legal obligation preclude the Commission from prohibiting the utility from choosing the winning bid?
- (5) Put another way: If the utility has a legal obligation to have sufficient capacity at all times, would it be lawful for the Commission to transfer the responsibility for resource selection from the utility --
 - (a) to the Commission?
 - (b) to an IE?

v) Unearned Advantages

- (1) Assume that the Commission identifies certain assets or resources, presently controlled by the utility, that give the utility an advantage in a competitive bid. Such advantages might include control of possible generation sites, control of transmission and distribution systems, access to information on the timing and location of load growth. Assume further that such advantages are competitively significant, and cannot feasibly be overcome by a competent competitor. (The assumptions are solely for the purpose of these questions; the Commission has not accepted them as fact.)
- (2) Under state law, does the Commission have authority to require the utility to make such resources available to potential competitors? If such authority exists, what standards must the Commission apply and what findings must the Commission make?

- (3) Under state or federal law (such as antitrust law), does the utility have any obligation (distinct from any obligation to follow lawful Commission orders) to make such resources available to potential competitors?
- vi) Utility Cost Recovery
- (1) Does the Commission have legal authority to "hold a utility to its bid," i.e., prohibit in all future rate cases recovery of costs exceeding the amount bid by the utility?
 - (2) Assuming such legal authority exists, is there any limit on it; i.e., is an exemption available if insisting on compliance would cause utility to become financially non-viable?
- vii) Dispute Resolution during the Competitive Bidding Process
- (1) Under Hawaii law, what powers can an IE have?
 - (2) What responsibilities, legally assigned to the PUC, may the PUC delegate to an IE?
 - (3) What responsibilities, legally assigned to the utility, may the utility delegate to an IE? Does the answer depend on whether the responsibility at issue flows directly from the statute, or instead flows from a Commission requirement?
 - (4) May the PUC lawfully direct the utility to delegate to an IE responsibilities which the statute assigns to the PUC?
 - (5) Assuming some delegation to an IE is permissible:
 - (a) to what extent must the Commission oversee an IE?
 - (b) to what extent may the Commission limit the appeals of IE decisions?
 - (6) Does state law require final Commission decision on every dispute or can the parties agree to make the IE decisions final? Does the answer depend on whether the matter under dispute is a matter assigned by statute to the utility or to the Commission?
 - (7) In the non-PURPA context, does state law create any legal rights in wholesale sellers to have disputes resolved outside of court?

- (8) If no such rights exist, does the Commission have the power to create such a right?
- (9) Assuming a utility selects its own project over an IPP project, where the utility follows all procedures established in the RFP, does a the losing IPP have any legal recourse?
- (10) What legal options are available to the Commission to create dispute resolution processes?

viii) **KIUC Exemption**

- (1) What are the RUS requirements for competitive procurement?
- (2) Does the member-owned coop status of KIUC allow the Commission to treat KIUC differently from HECO entities for purposes of competitive bidding rules?
- (3) Does the competitive procurement requirement of KIUC's RUS loan apply to all KIUC projects?
- (4) If KIUC were to submit its own bid in a competitive bidding process, does the existence of a RUS loan affect the lawfulness of the process? For example, could a losing bidder claim that the bidding opportunity was biased due to the advantage gained by KIUC from its RUS loan? Would such a bias make a legal difference under state law or under federal RUS law?
- (5) Under Hawaii law, can a "best practices" standard for KIUC coexist with a different standard for the rest of the state?

Panel N
Post-Hearing Procedural Options

i) **Possible Types of Commission Order**

- (1) General principles
- (2) Specific findings on major policy questions, such as utility-as-competitor, use of IE, utility cost recovery
- (3) Detailed rules and specifications (including specs for RFP and PPA)

ii) Possible Post-Hearing Procedures

- (1) Utility obligation to propose generic RFP and generic PPA, followed by --
 - (a) formal rulemaking or
 - (b) collaborative culminating in rulemaking
- (2) Formal rulemaking on other matters not decided by Commission-stated principles